COUNTERTERRORISM, CIVIL LIBERTIES, AND THE RULE OF LAW

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I. Introduction

The al-Qaeda attacks of September 11, 2001, ushered in a war on terrorism, which is now more than five years old. Some pundits refer to this conflict as "World War III." Others are now describing the conflict as the "Long War" because there seems to be no obvious conclusion on the horizon. However the conflict is described, everyone can agree that our government's response to terrorism carries enormous political and economic consequences. Now that five years have passed, it seems to be a propitious moment to take a few steps back from pressing nature of current events in order to assess such consequences.

This article will begin with an examination of the Bush administration's key counterterrorism policies. A disturbing pattern emerges from that examination, a pattern of disrespect for the law. The key policies have been generally rationalized on a legal theory of wartime necessity. That is, since America is at war, the president, as commander in chief, can basically take whatever actions that he deems necessary to "protect the country."[1] There are two problems with that approach to counterterrorism. First, the theory of legal necessity cannot withstand scrutiny. Second, quite often the policies that were advanced in the name of enhancing the safety of the citizenry have had the unintended consequence of undermining the fight against the al-Qaeda terrorist network.

II. Cutting Legal Corners

A. The Power to Arrest

The Fourth Amendment to the Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures

shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Bush administration has repeatedly sought to weaken the Fourth Amendment's limits on the government's power to arrest and search persons.

The arrest of a person is the quintessential "seizure" under the Fourth Amendment. In many countries around the world, police agents can arrest people whenever they choose, but in America the Fourth Amendment shields the people from overzealous government agents by placing some limits on the powers of the police. The primary "check" is the warrant application process. This process requires police to apply for arrest warrants, allowing for impartial judges to exercise some independent judgment with respect to whether sufficient evidence has been gathered to meet the "probable cause" standard set forth in the Fourth Amendment.[2] When officers take a person into custody without an arrest warrant, the prisoner must be brought before a magistrate within 48 hours so that an impartial judicial officer can scrutinize the conduct of the police agent and release anyone who was illegally deprived of his or her liberty.[3]

President Bush and his subordinates have undermined the Fourth Amendment's protections in three distinct ways. First, President Bush has asserted the authority to exclude the judiciary from the warrant application process by issuing his own arrest warrants. According to the controversial "military order" that Bush issued in November 2001, once the president determines that there is "reason to believe" a noncitizen is connected to terrorist activity, and that his or her detention is "in the interest of the United States," federal police agents "shall" detain that person "at an appropriate location designated by the secretary of defense outside or within the United States."[4] According to the order, the person arrested cannot get into a court of law to challenge the legality of the arrest.[5] The prisoner can only file appeals with the official who

ordered his arrest in the first instance, namely, the president. The whole purpose of the Fourth Amendment is to make such a procedure impossible in America.

Some have defended the constitutionality of that presidential order because it applies only to noncitizens. That argument has some surface appeal, but it cannot withstand scrutiny. It should be noted that while some provisions of the Constitution employ the term "citizens," other provisions employ the term "persons." Thus, it is safe to say that when the Framers of the Constitution wanted to use the narrow or broad classification, they did so. The Supreme Court has always affirmed this plain reading of the constitutional text.[6]

Second, President Bush and the FBI have tried to dilute the "probable cause" standard for citizens and noncitizens alike. The Supreme Court has repeatedly noted that a person cannot be hauled out of his home on the mere suspicion of police agents—since that would place the liberty of every individual into the hands of any petty official.[7] But in the days and weeks following September 11, the FBI arrested hundreds of people and euphemistically referred to the group as "detainees."[8]

Many of those arrests were perfectly lawful, but it is also clear that many were not. The FBI has tried to justify dozens of arrests with the following argument: "The business of counterterrorism intelligence gathering in the United States is akin to the construction of a mosaic. At this stage of the investigation, the FBI is gathering and processing thousands of bits and pieces of information that may seem innocuous at first glance. We must analyze all that information, however, to see if it can be fit into a picture that will reveal how the unseen whole operates. . . . What may seem trivial to some may appear of great moment to those within the FBI or the intelligence community who have a broader context."[9] At bottom, this is an attempt

to effect what Judge Richard Posner, in another context, has aptly called "imprisonment on suspicion while the police look for evidence to confirm their suspicion."[10]

Third, federal agents also misused an obscure federal statute, the material witness law, to detain suspects without having to charge them with a crime.[11] The material witness law is designed to secure a potential witness's testimony so that it will not be lost in situations where the individual witness seems likely to ignore a summons and flee the jurisdiction.[12] In the months following the September 11th attacks, federal agents used the law to incarcerate suspects, not witnesses. By "evading the requirement of probable cause of criminal conduct, the government bypassed checks on the reasonableness of its suspicion."[13]

The Supreme Court has repeatedly rebuffed police and prosecutorial attempts to dilute the constitutional standard of probable cause, but President Bush and his lawyers keep trying to expand the power of executive agents.

B. The Power to Seize Private Property

The Fourth Amendment does not ban all governmental efforts to search and seize private property, but it does limit the power of the police to seize whatever they want, whenever they want. The warrant application process is the primary check on the power of the executive branch to intrude into people's homes and to seize property. If the police can persuade an impartial judge to issue a search warrant, the warrant will be executed. However, if the judge is unpersuaded, he will reject the application and no search will take place. In the event of a rejection, the police can either drop the case or continue the investigation, bolster their application with additional evidence, and reapply for a warrant. The Bush administration has tried to expand the power of the executive branch by undermining and bypassing this constitutional framework.[14]

Section 215 of the Patriot Act created a new subpoena-like power that enables the police to seize private property. Bush administration officials said that provision was no cause for concern because (a) it was only about "business records;" (b) a federal judge had to approve everything; and (c) grand jury subpoenas basically perform the same purpose already. Those claims were very misleading. First, section 215 has a label entitled "business records," but it actually covers any "tangible" thing. Thus, section 215 can be used to seize medical records from doctors, educational records from schools, and records from libraries and bookstores. Indeed, section 215 can be used to seize personal belongings from someone's home. Second, there is only a facade of judicial review. Unlike the search warrant application process, the Patriot Act is written in such a way as to *mandate* approval by the judiciary. So long as the FBI certifies that it is engaged in a terrorism investigation, the judge must grant or modify the order.[15] Third, citizens can exercise their free speech rights concerning grand jury subpoenas and can challenge those subpoenas in court. But the Patriot Act makes it a crime for anyone to disclose the existence of the section 215 order and there is no provision for any legal challenge.[16] In testimony before the Senate Judiciary Committee, former Congressman Bob Barr (R-Ga.) observed, "Critics of this section [215] rightly charge that its open-ended scope and lack of meaningful judicial review open the door to abuses, and I agree."[17]

The Bush administration has also championed the use of "national security letters" (NSLs). An NSL is another subpoena-like device that empowers federal agents to demand certain records from businesspeople. Unlike a search warrant, executive branch agents do not need to apply to judges for these devices. These letters also threaten citizens with jail should they tell anyone about the government's demand. When a constitutional challenge was brought against NSLs, Mr. Bush's lawyers argued that they were fully consistent with the Bill of Rights.

The federal court was not persuaded. Federal Judge Victor Maerrero ruled that NSLs violated both the Fourth Amendment and the First Amendment.[18] NSLs violate the Fourth Amendment because they are written "in tones sounding virtually as biblical commandments," thus making it "highly unlikely that an NSL recipient reasonably would know that he may have a right to contest the NSL, and that a process to do so may exist through a judicial proceeding."[19] NSLs violate the First Amendment because they "operate as an unconstitutional prior restraint on speech."[20]

C. The Power to Eavesdrop

The Supreme Court has recognized that electronic surveillance, such as wiretapping and eavesdropping, impinges upon the privacy rights of individuals and organizations and is therefore subject to the Fourth Amendment's warrant clause.[21] President Bush claims that he can bypass the warrant application process and surveil the email and phone conversations of Americans because he is the commander-in-chief of the U.S. military.[22]

In December 2005 the *New York Times* broke a story about an eavesdropping program conducted by the National Security Agency (NSA).[23] Shortly after the September 11th terrorist attacks, President Bush ordered the NSA to eavesdrop on Americans inside the United States to search for terrorist activity. Trying to detect the presence of terrorists inside the United States is, of course, a valid and important objective, but President Bush authorized the NSA to eavesdrop on Americans without court-approved warrants that are ordinarily required for domestic spying. After the existence of this program was revealed, Mr. Bush made it plain that he would decide for himself whether to follow the Foreign Intelligence Surveillance Act (FISA) and seek a warrant—or not.[24]

President Bush's claim that he has the "inherent" power, as commander-in-chief, to order the secret surveillance of international email and telephone conversations of persons within the United States raises a host of disturbing questions.[25] For example, if the president can surveil international calls without a warrant, can he (or his successor) issue a secret executive order to intercept purely domestic communications as well? Can the president order secret warrantless searches of American homes whenever he deems it appropriate? Attorney General Alberto Gonzales has indicated that the president can order secret searches of American homes because President Bill Clinton deemed such break-ins "legal," as if that would bolster the validity of his claim.[26]

U.S. District Judge Anna Diggs Taylor ruled the NSA wiretap program unconstitutional on August 17, 2006. [27] The Bush administration has filed an appeal and the controversy is widely expected to reach the Supreme Court for an ultimate resolution.

D. The Power to Imprison

The most important constitutional issue that has arisen since the September 11th terrorist attacks has been President Bush's claim that he can arrest any person in the world and hold that person incommunicado indefinitely. According to the legal papers that Mr. Bush's attorneys have filed in the courts, so long as Mr. Bush has issued an "enemy combatant" order to his secretary of defense, instead of the attorney general, it does not matter if the prisoner is a foreign national or an American citizen.[28] And it does not matter if the prisoner was apprehended in Afghanistan or in some sleepy town in the American heartland. Under this sweeping theory of executive power, the liberty of every American rests upon nothing more than the grace of the White House.[29]

To fully appreciate the implications of the administration's "enemy combatant" argument, one must first consider the constitutional procedure of habeas corpus. The Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Since that provision appears in Article I of the Constitution, which sets forth the powers of the legislature, the implication is clear: Congress has the responsibility to decide whether or not the writ ought to be suspended. Notably, the Bush administration has not urged the Congress to suspend habeas corpus. Nor has President Bush asserted the claim that he can suspend the writ unilaterally. Mr. Bush's lawyers have instead tried to alter the way in which the writ operates when it is not suspended.

By way of background, the writ of habeas corpus is a venerable legal procedure that allows a prisoner to get a hearing before an impartial judge. If the jailor is able to supply a valid basis for the arrest and imprisonment at the hearing, the judge will simply order the prisoner to be returned to jail. But if the judge discovers that the imprisonment is illegal, he has the power to set the prisoner free. For that reason, the founders routinely referred to this legal device as the "Great Writ" because it was considered one of the great safeguards of individual liberty.[30]

The Bush administration's assault upon the Great Writ was indirect, but very real. It arose when a prisoner challenged the legality of his imprisonment. A man named Yaser Hamdi was initially captured in Afghanistan and was then transferred to the prison facility at Guantanamo Bay in Cuba. When the military authorities discovered that Hamdi was an American citizen, he was moved to a military brig in South Carolina. Because Hamdi was denied access to family and legal counsel, his father filed a writ of habeas corpus on his behalf in federal court. The Bush administration could have simply explained its reasons for jailing

Hamdi to the court—that Hamdi was captured on an overseas battlefield—but it chose to respond to that petition by urging the district court to summarily dismiss the petition because, it argued, the court could not "second-guess" the president's "enemy combatant" determination.[31] That assertion struck at the heart of habeas corpus. If the judiciary could not "second-guess" the executive's initial decision to imprison a citizen, the writ never would have acquired its longstanding reputation in the law as the "Great Writ."[32]

If Congress has not suspended the writ of habeas corpus, the law is clear. The prisoner must be able to meet with his attorney in order to adequately prepare for their "day in court."[33] That day is significant because it may be the prisoner's only opportunity to persuade a judge that a mistake has been made or that some abuse has occurred. Mr. Bush's attorneys tried to advance the astonishing notion that habeas corpus petitions could be filed—just as long as they were all immediately thrown out of court. Mr. Bush's attorneys failed to persuade the Supreme Court that its "enemy combatant" policy was lawful.[34] Writing for the Court, Justice Sandra Day O'Connor noted that "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[35] Justice Antonin Scalia recognized that even though the president and his lawyers were well-intentioned, their legal arguments were profoundly misguided: "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."[36]

Some conservative writers tried to downplay the significance of Mr. Bush's stance by arguing that "only" a few Americans have been imprisoned on the "enemy combatant" theory.[37] That argument misses the point completely. The American legal system is based upon precedent. If the Bush administration is successful in claiming that it can imprison just one

American citizen and deprive that person of habeas corpus protection, that precedent could be used against scores of citizens thereafter, whether by Mr. Bush himself or his successors.[38] It is for that reason that Mr. Bush's attempt to undermine "the very core of our liberty" may be his most egregious failure to protect and defend our Constitution.

E. "Debriefing"

The Bush administration has taken the position that terrorists are not covered by the Geneva Convention but that the U.S. government will treat all prisoners humanely. However, when members of Congress pressed Attorney General Alberto Gonzales about that policy, Gonzales admitted that the president could order the Central Intelligence Agency (CIA) to treat certain prisoners inhumanely.[39] President Bush repeatedly says that he will not order or condone torture, but it is unclear what interrogation methods are being used against prisoners in U.S. custody. When journalists ask questions about prisoner treatment, intelligence officials refuse to answer. Here is a telling excerpt from an interview with the then-director of the CIA, Porter Goss, with ABC News anchor Charles Gibson:

> **Charles Gibson:** Let me ask you about torture.
> **Porter Goss:** Mm hmm.
> **Charles Gibson:** You said the other day that the CIA does not do torture. Correct?
> **Porter Goss:** That is correct.
> **Charles Gibson:** How do you define it?
> **Porter Goss:** Well, I define torture probably the way most people would, in the eye of the beholder. What we do does not come close because torture, in terms of inflicting pain or something like that, physical pain or causing a disability, those kinds of things that probably would be a common definition for most Americans, sort of you know it when you see it, we don't do that because it doesn't get what you want. We do debriefings because debriefings are, the nature of our business is to get information and we do all that, and we do it in a way that does not involve torture because torture is counterproductive.
> **Charles Gibson:** We reported in the past two weeks about, having talked to a number of people who have worked and did work in this agency, about six

> progressive techniques, each one harsher than the last to get terrorists to talk, including things like long term standing up, sleep deprivation, exposure for long periods of time to cold rooms, or something called water boarding, which involves cellophane and, over the face and water being poured on an individual. Do those things take place?
> **Porter Goss:** (inaudible) we just simply . . .
> **Charles Gibson:** You know, you know what water boarding is, though, right?
> **Porter Goss:** I, I know what a lot of things are, but I am not going to comment.
> **Charles Gibson:** Would that come under the heading of - would that come under the heading of torture?
> **Porter Goss:** I don't know. I . . .
> **Charles Gibson:** Well, under your definition of torture that you just gave me of inflicting pain?
> **Porter Goss:** Let me put it this way, I'm not going to comment on any individual techniques that anybody has brought forward as an allegation or have dreamed up or anything like that. What we do, as I've said many times, is professional, is lawful, it yields good results and it is not torture.[40]

When a lawsuit was brought against Secretary of Defense Donald Rumsfeld by men who claimed that they were tortured during their imprisonment in Iraq and Afghanistan, government attorneys urged the judiciary to throw the lawsuit out because Rumsfeld has "legal immunity."[41] If the government is successful with its immunity argument, there may be no legal remedy for torture victims. The administration wants everyone to think that this absence of a remedy is no cause for concern because, it repeats, torture is not condoned. Such circular contentions are unlikely to be countenanced by the judiciary.

F. Expanding the Jurisdiction of Military Courts

Article III, section 2, of the Constitution provides, "The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury." The Sixth Amendment to the Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." To limit the awesome powers of government, the Framers of the Constitution designed a system in which citizen juries stand between the apparatus of the state and the

accused. If the government prosecutor can convince a jury that the accused has committed a crime and belongs in prison, the accused will lose his liberty and perhaps his life. If the government cannot convince the jury with its evidence, the prisoner will go free. In America, an acquittal by a jury is final and unreviewable by state functionaries.

President Bush has tried to deny the benefit of trial by jury to noncitizens accused of terrorist activities. The president's November 2001 "Military Order" proclaimed his authority to decide who can be tried before a jury and who can be tried before a military commission.[42] Some conservative legal scholars have argued that Bush's military order did not go far enough. They have urged Mr. Bush to revise and extend his military order to American citizens as well.[43]

The federal government did try people before military commissions during the Civil War. To facilitate that process, President Abraham Lincoln suspended the writ of habeas corpus—so that the prisoners could not challenge the legality of their arrest or conviction in a civilian court.[44] The one case that did reach the Supreme Court, *Ex Parte Milligan* (1866), deserves careful attention.[45]

In *Milligan*, the attorney general of the United States, James Speed, maintained that the legal guarantees set forth in the Bill of Rights were "peace provisions." During wartime, he argued, the federal government can suspend the Bill of Rights and impose martial law. If the government chooses to exercise that option, the commanding military officer becomes "the supreme legislator, supreme judge, and supreme executive."[46] Under that legal theory, many American citizens were arrested, imprisoned, and executed without the benefit of the legal mode of procedure set forth in the Constitution—trial by jury.

The Supreme Court ultimately rejected the legal position advanced by Attorney General Speed. Here is a key passage from the *Milligan* ruling:

> The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right to trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases.[47]

The *Milligan* ruling is sound. While the Constitution empowers Congress "To make Rules for the Government and Regulation of the land and naval Forces" and "To provide for organizing, arming, and disciplining, the Militia," the Supreme Court ruled that the jurisdiction of the military courts could not extend beyond those people who were actually serving in the army, navy, and militia. That is an eminently sensible reading of the constitutional text.[48]

President Bush and his lawyers say that terrorists are "enemy combatants" and that enemy combatants are not entitled to the protections of the Bill of Rights. The defect in the president's claim is circularity. A primary function of the trial process is to sort through conflicting evidence in order to find the truth. Anyone who *assumes* that a person who has merely been accused of being an unlawful combatant is, in fact, an enemy combatant, can understandably maintain that such a person is not entitled to the protection of our constitutional safeguards. The flaw, however, is that that argument begs the very question under consideration.

To take a concrete example, suppose that the president accuses a lawful permanent resident of the U.S. of aiding and abetting terrorism. The person accused responds by denying the charge and by insisting on a trial by jury so that he can establish his innocence. The president responds by saying that "terrorists are unlawful combatants and unlawful combatants are not entitled to jury trials." The president also says that the prisoner is not entitled to any access to the

civilian court system to allege any violations of his constitutional rights.[49] With the writ of habeas corpus denied, the prisoner and his attorney can only file legal appeals with the president—the very person who ordered the prisoner's arrest in the first instance!

There are legal precedents in American law for prosecuting noncitizens for war crimes before military commissions.[50] The Bush administration's initial attempt to set up a commission system was struck down by the Supreme Court in *Hamdan v. Rumsfeld*.[51] But the Court essentially ruled that the president could not act unilaterally. After *Hamdan*, the administration secured congressional approval with the "Military Commissions Act," which was enacted in the fall of 2006.[52] The U.S. military will now try certain persons before commissions for violations of the laws of war. The judiciary will then consider appeals in specific cases, such as whether the military legal procedures comport with due process.

III. The Repercussions of Legal Shortcuts

Without the benefit of an official confession, one can only speculate about the underlying reasons for the legal shortcuts that have been taken by the Bush administration over the past five years. In general, the likely perception was that the "benefits" to be derived from skirting the law outweighed the "costs" of adhering to the law.[53] However, the record suggests that the president and his advisors have systemically underestimated the costs of their policy choices.

The establishment of an American prison facility at Guantanamo Bay, for example, made sense from a security perspective. Remove al-Qaeda fighters from the theatre of war and incapacitate them in a place where escape was extremely difficult. An island prison would also make it difficult, if not impossible, for al-Qaeda operatives to attempt any attack. But Guantanamo quickly became a worldwide symbol of repression at the same time that President

Bush was going to war to "defend freedom and spread democracy." It was not just the images of hooded and shackled men, it was the policy pronouncements that the Geneva Convention was inapplicable, the blanket denial of access to outsiders, including the International Red Cross, and the prospect of indefinite detention without judicial review.[54] As James Zogby, president of the Arab American Institute, has noted:

> President Bush has rightly linked the spread of democracy to the war on terrorism. Unfortunately, civil liberties abuses against Arabs and Muslims in the U.S. and the indefinite secret detention and highly coercive interrogation of Arab and Muslim detainees in Guantanamo Bay and other locations has undermined our openness and harmed our ability to advocate credibly for democratic reforms in the Middle East. In fact, some Arab governments now point to American practices to justify their own human rights abuses. As President Bush suggested, and as we have learned so painfully, anti-democratic practices and human rights abuses promote instability and create the conditions that breed terrorism. Democratic reformers and human rights activists used to look to the U.S. as an exemplar, the city on a hill. Now they are dismissed by their countrymen when they point to the American experience.[55]

Zogby's point that the damage that has been done to the image of the United States, and to the values that we have sought to project, is profound.[56]

Nor have such repercussions been limited to Arabs and Muslims. Attorneys general from Australia's eight states and territories are demanding that David Hicks, an Australian who has been imprisoned at Guantanamo for five years, be sent home. According to the Bush administration, Hicks trained with al-Qaeda and so he has been lawfully detained as an "enemy combatant." The attorney general of New South Wales, Bob Debus, said he does not have "any particular sympathy for David Hicks, [but] we have a bedrock commitment to the [legal] principles by which he should be dealt with."[57]

Given the global nature of the al-Qaeda network, the United States has an obvious interest in securing the cooperation of foreign governments. Such cooperation can range from

coalition building for military operations to legal extradition of prisoners to information sharing. When the United States alienates foreign governments, these American interests are undermined. In his book, *Terrorism, Freedom, and Security*, Philip B. Heymann points out that policymakers must not underestimate the stakes, such as the inability to discover who may be plotting against us.

> A well-documented example of this was our effort to investigate who was responsible for a truck bomb explosion at the Khobar Towers military base in Saudi Arabia. There, the FBI struggled in a complicated world of Middle East politics where evidence available to Saudi Arabia pointed to the responsibility of Iran. Fearing that our response to obtaining that evidence would be an attack on Iran, the Saudis tried to avoid what they anticipated would then be retaliation by Iran against Saudi Arabia. What evidence we could obtain necessarily depended on permission to investigate within Saudi Arabia—an activity that is forbidden by international and national laws unless consent is first obtained. Obtaining that consent—something never fully accomplished—depended upon a network of cooperative relations between the Saudis and us.[58]

Heymann notes that America's allies are not likely to deliberately withhold vital intelligence from the U.S. The more likely result of alienation will be the failure to generate an *enthusiastic commitment* to our cause. Such an inchoate "cost" is impossible to measure, of course, but that does not diminish its existence or importance. To take a concrete example, in instances where intelligence leads are non-obvious, yet promising, such leads may never be pursued or shared.

Domestic counterterrorism measures have generated similar "costs." An aggressive investigation into the mass murder of September 11 was necessary and perfectly proper, but federal agents too often overreached. Arbitrary arrests, deportations, and, in some instances, lawless threats about seizing children unless certain information was provided had the effect of spreading fear throughout the Arab-American and Muslim communities. Osama Sewilam asked a policeman for directions to his immigration attorney's office because his visa had recently

expired. The policeman took Sewilan to the police station and called the FBI. Sewilan was subsequently deported.[59] Eyad Mustafa Alrababah, a Palestinian living in Connecticut came forward and voluntarily went to an FBI office to tell the bureau that he recognized several of the 9-11 hijackers and that he had driven some of them to Virginia in June 2001. Alrababah was locked up as a material witness and held in solitary confinement for over 120 days.[60] Those are just two among scores of such incidents.[61] Federal authorities are not oblivious to the costs of such tactics.[62] They must realize that the overall climate will discourage persons from coming forward with potentially useful information. Still, even though it is impossible to measure, this is another area in which the administration has seriously underestimated the repercussions of its legal shortcuts.

IV. Conclusion

President Bush has delivered many speeches where he tells audiences that he wants to use every "legal" means at his disposal so that he can "protect the country." That is what most Americans want to hear and believe. Unfortunately, Mr. Bush appears to believe that he is the ultimate arbiter of what is legal and what is illegal—at least in matters relating to national security. Indeed, Mr. Bush's lawyers have informed the federal judiciary that they regard the entire world, including every inch of U.S. territory, as a "battlefield." That claim has profound implications for the Bill of Rights because there are *no* legal rights whatsoever on the battlefield. By twisting and redefining the term "battlefield," the president seems prepared to override any law that hinders federal police agents, federal intelligence agents, or military personnel. Despite his protestations to the contrary, President Bush's actions exhibit a profound disrespect for the Constitution and the rule of law.[63]

The president and his advisors probably perceived some short term advantages to cutting legal corners, but they miscalculated. The reputation and credibility of the United States has been tarnished by the administration's key counterterrorism policies. Instead of uniting the civilized world against al-Qaeda, President Bush has managed to alienate potential allies at home and abroad. Since the on-going conflict with al-Qaeda is global in nature, the United States not only requires the cooperation of citizens and noncitizens in the homeland, but the cooperation of governments around the world. The best way to secure such cooperation and defend the homeland over the long term is to respect human rights and the law. The overriding objective ought to be a counterterrorism policy that is aggressive, effective, and legal. If policymakers truly commit themselves to that objective, the principles of a free society, the principles that we are seeking to defend, will endure.

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[1] See generally Jane Meyer, "The Hidden Power," *New Yorker*, July 3, 2006; John Yoo, *War By Other Means* (New York: Atlantic Monthly Press, 2006).
[2] See *McDonald v. United States*, 335 U.S. 451, 455-56 (1948).
[3] See *County of Riverside v. McLaughlin*, 500 U.S. 654 (1988).
[4] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (hereinafter "Bush Military Order").
[5] Section 7(b)(2) of the Military Order provides, "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof."
[6] See *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Wong Wing v. United States*, 163 U.S. 228 (1896). Noncitizens have always benefited from the safeguards of the Fourth Amendment. See *Au Yi Lau v. INS*, 445 F.2d 217 (1971); *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (1976).
[7] See *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).
[8] See Elizabeth Neuffer, "Judge Says N.J. Can't Hide ID's of People in Custody," *Boston Globe*, March 27, 2002; and Russ Feingold, "Name the Detainees," *Washington Post*, December 23, 2001.
[9] Quoted in Amy Goldstein, "A Deliberate Strategy of Disruption," *Washington Post*, November 4, 2001.
[10] *Llaguno v. Mingey*, 763 F.2d 1560, 1568 (1985).
[11] Steve Fainaru and Margot Williams, "Material Witness Law Has Many in Limbo," *Washington Post,* November 24, 2002, p. A1.
[12] Stacey M. Studnicki and John P. Apol, "Witness Detention and Intimidation: The History and Future of Material Witness Law," *St. John's L. Rev.* 76 (2002): 483.
[13] "Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11," Human Rights Watch (June 2005), Vol. 17, No. 2.
[14] In addition to Patriot Act 215 orders and National Security Letters, discussed in the text, President Bush has also championed some other dubious proposals, such as "sneak and peek" search warrants and "administrative" subpoenas for federal agents. For a critique, see Stephen J. Schulhofer, *Rethinking the Patriot Act* (New York: Century Foundation Press, 2005).

[15] "Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section." If the FBI can remember to include boilerplate language about "terrorism investigations" in its requests, the applications will easily meet "the requirements" of section 215. See Stephen J. Schulhofer, *Rethinking the Patriot Act* (New York: Century Foundation Press, 2005), pp. 55-78.
[16] Dan Eggen, "Secret Court Poses Challenges: Non-Government Litigants Lack Access, Ways to Influence Cases," *Washington Post*, August 30, 2004.
[17] Testimony of Bob Barr on the USA Patriot Act before the Senate Judiciary Committee, May 10, 2005. See also Bob Barr, "Clearing the Air on the Patriot Act," *Washington Times,* May 17, 2005.
[18] See *Doe v. Ashcroft*, 334 F.Supp.2d 471 (2004).
[19] Ibid., p. 501.
[20] Ibid., p. 475.
[21] *Katz v. United States*, 389 U.S. 347 (1967) *United States v. United States District Court*, 407 U.S. 297 (1972) ("the *Keith* case"). The Supreme Court has not ruled directly on the question of warrantless domestic surveillance of American citizens who are agents of foreign powers, but the separation of powers rationale outlined in the *Keith* opinion applies directly to the current controversy over the NSA program: "Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. … those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." Ibid., pp. 316-17.
[22] The Bush administration also relies upon a congressional resolution that was passed shortly after the September 11th attacks which authorized the use of military force. See Authorization for Use of Military Force, Pub. L. N. 107-40, 115 Stat. 224 (September 18, 2001). However, Mr. Bush's lawyers have made it clear that even if that resolution had not been enacted, the president could have proceeded with his controversial eavesdropping program. According to a white paper released by the Department of Justice, "The NSA activities are supported by the President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States." "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," Department of Justice, January 19, 2006.
[23] James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," *New York Times*, December 16, 2005.
[24] Charlie Savage, "Bush Launches a Bid to Justify Domestic Spying," *Boston Globe*, January 24, 2006.
[25] See Elizabeth B. Bazan and Jennifer K. Elsea, "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information," (Washington: Congressional Research Service, 2006).
[26] In defense of the NSA program, Mr. Bush's top law enforcement official stated, "The Justice Department during the Clinton Administration testified in 1994 that the President has inherent authority under the Constitution to conduct foreign intelligence searches of the private homes of U.S. citizens in the United States without a warrant." Prepared Remarks for Attorney General Alberto R. Gonzales at the Georgetown University Law Center, January 24, 2006. Turning to Mr. Clinton's constitutional claims for guidance is a mark of how low the Bush administration has sunk. For a critique of Mr. Clinton's record, see Timothy Lynch, "Dereliction of Duty: The Constitutional Record of President Clinton," Cato Institute Policy Analysis no. 271, March 31, 1997.
[27] See Dan Eggen and Dafna Linzer, "Judge Rules Against Wiretaps," *Washington Post,* August 18, 2006, p. A1.
[28] See Brief for United States, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). See also Brief for United States, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).
[29] See Timothy Lynch, "Affront to Civil Liberties," *National Law Journal,* October 3, 2005.
[30] In the Federalist no. 84, for example, Alexander Hamilton wrote that the habeas corpus provision was a "great security to liberty and republicanism." *The Federalist,* ed. George W. Carey and James McClellan (Dubuque, Iowa: Kendall-Hunt, 1990), p. 442.
[31] Brief for Respondents-Appellants at 12, *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002).
[32] See Timothy Lynch, "Hamdi and Habeas Corpus," *Wall Street Journal*, April 23, 2004.
[33] Brief for Cato Institute, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[34] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[35] *Hamdi,* 542 U.S. at 536.
[36] *Hamdi,* 542 U.S. pp. 554-55 (Scalia, J., dissenting).

[37] For example, Rich Lowry, editor of *National Review*, dismissed the alarm expressed by civil libertarians about Bush's actions in this case as an example of overheated rhetoric. Lowry sarcastically mocked those concerned about the constitutional issue: "The other dire threat to our liberties is that two American citizens—count them: one, two—are being held as enemy combatants." Rich Lowry, "The Price of Life Without a Shield," *Washington Times*, October 29, 2002.
[38] Interestingly, it appears that then-Attorney General John Ashcroft had to wage a behind-the-scenes battle to stop Vice-president Dick Cheney and Defense Secretary Donald Rumsfeld from locking up more Americans in military prisons. See Michael Isikoff and Daniel Klaidman, "White House and Justice Officials Had Fierce Debates Over How To Treat Americans With Suspected Al Qaeda Ties: Either Lock Up Indefinitely As 'Enemy Combatants' or Let System Work," *Newsweek,* April 26, 2004.
[39] Eric Lichtblau, "Gonzales Says Humane-Policy Order Doesn't Bind CIA," *New York Times,* January 19, 2005. For the case against torture, see Michael Kinsley, "Torture for Dummies," *Slate*, December 13, 2005.
[40] *Good Morning America,* ABC News transcript, November 29, 2005.
[41] Matt Apuzo, "Rumsfeld Wants Torture Case Dismissed," Associated Press, December 8, 2006.
[42] Bush Military Order, Sections 2(a)(1), 2(a)(2), and 3(a). See also William Safire, "Kangaroo Courts," *New York Times*, November 26, 2001.
[43] Robert H. Bork, "Having Their Day in (a Military) Court," *National Review*, December 17, 2001; Douglas W. Kmiec, "This Is War, and Military Justice Is Appropriate," *Los Angeles Times*, June 14, 2002. But see Robert A. Levy, "Don't Shred the Constitution to Fight Terror," *Wall Street Journal*, November 20, 2001; and Robert A. Levy, "Misreading '*Quirin*,'" *National Law Journal*, January 14, 2002.
[44] See William H. Rehnquist, *All the Laws but One* (New York: Knopf, 1998), pp. 11–25.
[45] *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
[46] *Ex Parte Milligan.*
[47] *Milligan*, pp. 122–23 (emphasis in original).
[48] See Timothy Lynch, "Power and Liberty in Wartime," *Cato Supreme Court Review* 23 (2004).
[49] Because the president's military order immediately became mired in controversy, his lawyers have backed away from what that order actually says. For example, the Justice Department denies any attempt to suspend habeas corpus. That denial is not persuasive. See Section 7(b)(2) of the Bush military order.
[50] See *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Application of Yamashita*, 327 U.S. 1 (1946).
[51] *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).
[52] Michael A. Fletcher, "Bush Signs Terrorism Measure," *Washington Post*, October 18, 2006, p. A4.
[53] There is, to be sure, a school of thought that defends a broad conception of executive power, but that cannot explain the wide-ranging pattern of legal shortcuts that has taken place in recent years.
[54] Stuart Taylor, "Guantanamo: A Betrayal of What America Stands For," *National Journal,* July 26, 2003; Anthony Lewis, "Guantanamo's Long Shadow," *New York Times*, June 21, 2005.
[55] Statement of Dr. James J. Zogby, President, Arab American Institute, before the House Judiciary Committee, June 10, 2005.
[56] See Stefan Halper and Jonathan Clarke, *America Alone* (Cambridge University Press, 2004), pp. 311-313.
[57] Raymond Bonner, "A Lawyer in Marine Corps Khaki Wins Australian Support for His Guantanamo Client," *New York Times*, December 1, 2006.
[58] Philip B. Heymann, *Terrorism, Freedom, and Security: Winning Without War* (Cambridge, MA: MIT Press, 2003), p. 119.
[59] James Bovard, *Terrorism and Tyranny*, (New York: Palgrave MacMillan, 2003), pp. 110-111.
[60] Ibid.
[61] Note also Dan Eggen, "Seizure of Business Records is Challenged; ACLU and Arab American Groups File Lawsuit Over Element of USA Patriot Act," *Washington Post*, July 31, 2003, p. A2.
[62] Mary Beth Sheridan, "Muslim, Arab Residents Meet with FBI; Speakers Seek Better Relations, Question Tactics in Fight Against Terrorism," *Washington Post*, August 7, 2003, p. B5.
[63] For a more extensive treatment of the legal and constitutional record of the Bush administration, see Gene Healy and Timothy Lynch, *Power Surge: The Constitutional Record of George W. Bush* (Washington: Cato Institute, 2006).